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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1079

GREAT LAKES TRANSIT CORPORATION,
Petitioner and Appellant Below,

vs.

ALFRED G. MARCEAU,
Respondent and Appellee Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ULYSSES S. THOMAS,
Attorney for Petitioner.

RUSSELL V. BLEECKER,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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1. By applying for and receiving an award of state compensation prior to bringing the instant action at law, did the respondent thereby elect his remedy, barring recovery in the case at bar? 6

2. Is the decision of this Court in O'Donnell vs. Great Lakes, etc., 318 U. S. 36, (Feb. 1, 1943) extending provisions of the Jones Act, Title 46, U. S. C. A. Sec. 688, to cover shore injuries to seamen injured in the course of their employment, to be given a retroactive effect to cover a cause of action accruing on November 8, 1940, and not pending on the date of the O'Donnell decision? 7

3. Is a seaman injured on the dock at which his ship is moored, while returning thereto from shore leave to perform a regularly assigned duty, "in the course of his employment" in the meaning of the term as used in Title 46 U. S. C. A. Sec. 688, (the Jones Act) and as distinguished from the term "in the service of the ship"? 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Statement of the Case.

This is an action at law brought, on September 23, 1943, in the District Court for the Western District of New York under Title 46, U. S. C. A. Sec. 688 (Jones Act) by respondent herein, for damages for injuries alleged to have been sustained on November 8, 1940, by falling on the dock alongside which the steamer "Alfred H. Smith" to which he was

attached as a member of crew, was being unloaded and loaded by the Conners Contracting Company, independent stevedores under contract with petitioner (R. p. 218). At the time of the accident, allegedly caused by the negligence of the petitioner in permitting or causing a spot of flour or meal (part of the ship's cargo) (R. p. 215) to exist on the dock near the foot of the ship's ladder, (R. pp. 2 and 3), respondent was returning to the vessel from shore leave to perform his duty as second cook, by preparing the crew's midnight lunch (R. p. 52). He had a shore leave earlier in the day (R. p. 77) but had returned to prepare the 6:00 o'clock supper and again departed the ship on shore leave at the end of that meal (R. p. 77).

At about 11:40 P. M. loading and unloading being in progress, respondent approached the vessel returning from his second shore leave, unconnected with business of the ship (R. p. 91) and as he neared the foot of the ladder, slipped and fell in a spot of meal or flour that he saw prior to stepping into it (R. p. 54). He allegedly sustained injury that one of his attending physicians testified was entirely mental (R. p. 190).

In April 1941, respondent applied for and received an award of compensation under the New York Compensation law (R. p. 80), the award being affirmed by the Industrial Board in March, 1943. Also, in the spring of 1941 respondent filed an action at law in the Supreme Court of New York against the Conners Contracting Company, stevedore, (R. p. 82), alleging its negligence in loading and unloading the ship.

The instant action was filed in September, 1943, the petitioner impleading the Conners Contracting Company, steve-

dore, which, during the trial, on motion of its counsel, was dismissed from the case (R. p. 291). The trial was by jury and verdict and judgment were rendered in favor of respondent against petitioner for $4500.00. An appeal was taken by petitioner to the Circuit Court of Appeals for the Second Circuit, which affirmed the judgment at the trial court.

The principal defenses offered by the petitioner at trial were:

1. By applying for and receiving an award of state compensation the petitioner elected his remedy barring this action at law.
2. That on November 8, 1940, the provisions of the Jones Act did not extend to seamen's shore injuries, and that therefore the District Court was without jurisdiction.
3. That respondent being on shore leave, unconcerned with the business of the ship, was not injured in the course of his employment although still in the service of the ship. The Court was therefore without jurisdiction of the cause.

II.

Reasons Relied on for Allowance of the Writ.

1. The decision of the said Circuit Court of Appeals as to the respondent's having elected his remedy by applying for and receiving an award of state compensation by holding that there is no basis for the petitioner's invoking the doctrine of election of remedies, is a decision of a question probably in conflict with applicable decisions of this Court.
2. The decision of the Circuit Court of Appeals as to the retroactive effect of the decision of this Court in

O'Donnell vs. Great Lakes Dredge & Dock Company, 318 U. S. 36, by holding that said decision is no more than a declaration of what was the law from the date the Jones Act took effect, involves an important question of federal law which has not been, but should be, settled by this Court.

3. The decision of the Circuit Court of Appeals as to whether or not the respondent was injured in the course of his employment, by holding that he was under orders to return to his ship from shore leave and holding that in returning to his vessel from that leave he was in the course of his employment, involved an interpretation of a statute (Title 46 U. S. C. A. Sec. 688, the Jones Act) of great importance to the shipping industry and calls for an authoritative and elucidating decision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Second Circuit had in the case, numbered and entitled on its docket No. 151, Great Lakes Transit Corporation, appellant, vs. Alfred G. Marceau, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Second Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated: February 20, 1945.

ULYSSES S. THOMAS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion in the Circuit Court of Appeals for the Second Circuit (R. p. ....), is dated January 9, 1945 and is not yet reported.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is January 9, 1945.

The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28 U. S. C. Sec. 347.

III.

Statement of the Case.

This has already been stated in the preceding petition under I. pp. 1-3, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the respondent, having sought and received an award of

state compensation prior to the bringing of this action, had not elected his remedy, barring the instant cause.

2. The Circuit Court of Appeals erred in holding that the District Court had jurisdiction of a cause of action arising out of a seaman's being injured on land, on November 8, 1940.

3. The Circuit Court of Appeals erred in holding that a seaman on shore leave, under orders to return to his ship at a specified time to stand his regularly assigned watch, and being injured on land as he approached his vessel, was injured in the course of his employment.

V.

Argument.

The test of what constitutes an election of remedies is clearly and unambiguously announced by this Court in United States vs. Lumber Company 260 U. S. 290:

"3. Any decisive action by a party with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based on one or the other of the inconsistent remedies.

7. The election of remedies is determined by the bringing and maintenance of the suit and not by the final determination by the Court.

8. The doctrine of election of remedies and that of *res judicata* are not the same, but each is based on the maxim forbidding that one shall be twice vexed for one and the same cause".

Herein the Industrial Board of New York affirmed the award of compensation *six months* prior to the institution of this action. The respondent at the time of applying for compensation was represented by counsel and was therefore presumably aware of his rights and certainly of the facts. And it is to be noted that the respondent, recipient of an award of compensation *and* a judgment in a tort action *has never withdrawn* his claim for compensation.

The Circuit Court of Appeals ignored the above quoted law as enunciated by this Court and their decision is in direct conflict with the principle laid down.

POINT II.

Respondent allegedly sustained his injury on November 8, 1940. At that time the Courts of Appeals for the second, third, fifth and ninth circuits had held the courts to be without jurisdiction under the Jones Act, for seamen's shore injuries. In two of these cases, this Court had denied certiorari.

Todahl vs. Christenson, 5 Fed. 2d, 462 (9th Circuit) was decided in April, 1925.

The Montezuma, 19 Fed. 2d 355, (2d Circuit) was decided in May, 1927.

Esteves vs. Lykes Bros., 74 Fed. 2d 364 (5th Circuit) was decided in December 1934 and certiorari denied in May, 1935.

O'Brien vs. Calmar S. S. Corp., 104 Fed. 2d 148 was decided in May 1939 and certiorari denied in October of the same year.

On February 1, 1943, this Court, in O'Donnell vs. Great Lakes, etc., 318 U. S. 36, interpreted the Jones Act to apply to seamen's shore injuries suffered *in the course of the employment*. Now is presented the question as to whether the act applies to shore injuries sustained on land while the seaman is on *shore leave*, unconnected with the ship's business.

Thus for eighteen years prior to the decision in O'Donnell vs. Great Lakes, etc., *supra*, under the law of one circuit the Jones Act did not apply to shore injuries; for sixteen years, the law was such in two circuits; for nine years in three circuits and for four years in four circuits. And O'Donnell vs. Great Lakes, etc. *supra*, followed the last denial of certiorari by this Court by nearly four years.

On or about November 8, 1940 respondent entered into a contract of maritime employment with petitioner. If the decision in O'Donnell vs. Great Lakes, etc. *supra*, be given a retroactive effect, the terms and conditions of the contract of employment are altered and enlarged by a new liability and obligation imposed upon the petitioner in a cause of action that was not even pending at the date of the O'Donnell decision. The instant action was not filed until September 21, 1943, nearly seven months subsequent to the date of the O'Donnell decision by this Court.

The proposition urged is simply that the decision in the O'Donnell case should not be given retroactive effect upon an inchoate cause of action, whether that cause sound in contract or tort.

> "Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States Court as to the effect of a change of decision which detrimentally affects contract rights and

obligations entered into before such change, such rights and obligations should be determined by the law as judicially determined at the time the rights accrued".

Moore-Mansfield Cons. Co. vs. Elec. Install. Co., 234 U. S. 619.

At the time (November 8, 1940) that respondent's cause of action accrued, petitioner, as a derivative of the contract of employment, had a perfect defense to an action under the Jones Act. Such defense constituted a vested right.

"The moment a contract is made, a right is vested in each party to have it remain unaltered, and to have it performed".

Macedo vs. Macedo, 84 Pac. 2d 552, 554 (Cal.).

"There is a vested right in an accrued cause of action, in a defense to a cause of action, even in the statute of limitations".

Lewis vs. Penn. R. Co., 220 Pa. 317, 69 At. 821.

"The law to be applied is that in effect when the plaintiff's right to compensation arose, that is, when a compensable injury occurred".

Farmer vs. Bieber, etc., 172 At. 95.

"The plaintiff's rights must be determined by the law in force on the day of his injury".

Panico vs. Sperry, Etc., 15 At. 802.

So, if in this case, the decision of this court in the O'Donnell case be given a retroactive effect, petitioner herein is deprived of a defense, a vested right, available to it as an adjunct of the contract of employment.

We can find no case on all fours with the case at bar. There appear to be two lines of cases on the question, with much confusion of thought. The Circuit Court of Appeals, without giving us the benefit of a single authority, dismisses the point as follows:

"The decision of the Supreme Court in O'Donnell vs. Great Lakes, 318 U. S. 36, must be regarded as no more than a declaration of what was the law from the date the Jones Act took effect".

We urge that the question is of sufficient general importance that an authoritative decision is needed.

Mr. Justice Rutledge sat in the case of Warring vs. Colpoys, 122 Fed. 2d 642. Therein the Court said:

"* * * If later the Court reverses its construction, a new angle of thought is often injected * * * After all the statute always was the law * * * Since the two constructions are inconsistent, to be practical, the latter must be chosen as right, and the former never was the law. That means that just about everybody was fooled * * * But courts have often concluded that to apply the new construction to a previous transaction would be unjust. (Citing cases.)

"Where the law is changed by judicial decision, such change will not affect transactions made with reference to the law as it stood previous to such change".

Metzger vs. Greiner, 9 O. C. C. N. S. 364.

"Any and all citizens have a right, in the arrangement of their affairs, to assume that an interpretation of a statute by the Supreme Court of the state is the law of that subject and a subsequent contra decision should not be given a retroactive effect".

Mercantile Bank vs. Lander, 12 OFD 426.

POINT III.

Respondent was allegedly injured whilst returning to his ship from leave ashore (R. pp. 90 and 91). The specious argument that he was under orders to return is offered. He was returning to perform his regularly assigned duty as second cook—to prepare the crew's midnight lunch. Every member of a crew granted shore leave is under orders to

return, and if respondent's argument be sound, then every officer and man going ashore on leave is in the course of his employment from the time he leaves his vessel until he returns, no matter where he goes or in what manner he spends his time ashore.

The question of whether a seaman injured ashore while on leave is in the course of his employment as distinguished from service of the ship is certainly a question of great importance to the shipping industry and should be authoritatively determined. Clearly respondent is entitled to maintenance and cure if he can make a case on the merits, but that contractual obligation on the part of the petitioner is a vastly different question from the latter's liability in tort under the Jones Act.

Looking to the meaning of the phrase "course of employment" in the light of the Employer's Liability Act, the pertinent provisions of which are incorporated in the Jones Act:

> "If the employee at the time of the accident was not in discharge of a duty he was not entitled to protection".
>
> Koonse vs. Mo. Pac. Ry., 322 Mo. 813.
> (Cer. den. 280 U. S. 582).

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

ULYSSES S. THOMAS,
Counsel for Petitioner.

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Plaintiff-Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

THOMAS C. BURKE,
EDWARD J. DESMOND,
JOHN E. DRURY, JR.,
Counsel for Respondent.

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ALFRED G. MARCEAU,
Plaintiff-Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Statement and Facts.

Respondent was employed by petitioner as a second cook or assistant steward aboard its vessel "ALFRED H. SMITH," being loaded at a dock in Buffalo Harbor, owned by the New York Central Railroad Co., but leased to, and operated by, petitioner. On November 8, 1940, shortly before midnight he was returning to the vessel to take care of the night lunch at the direction of the steward *(Record*, pp. 51-52), when the accident in question occurred.

The dock slopes sharply down to the edge of the water and the ship's ladder rested on or against this slope (pp.

60-62). During the course of the loading, meal or flour had been spilled on the dock around the bottom of the ladder and the area covered by the meal or flour had become slippery due to a rain earlier in the evening. Someone had thrown sawdust or shavings over the area (pp. 54-55). There were no lights in the vicinity (p. 55), and respondent, in going down the incline to the ladder, slipped on the area covered by the meal and fell, striking his groin on the upright of the ladder and his back on a dock cleat (p. 54).

Following the decisions, which at that time refused to apply the Jones Act to injuries to seamen occurring on land and applied the local law of the jurisdiction where the accident occurred, respondent, in the Spring of 1941, filed a claim for compensation with the New York State Workmen's Compensation Bureau, which finally resulted in an award in his favor, and an affirmance thereof by the Industrial Board on the 28th day of February, 1942. Petitioner appealed to the New York Supreme Court, Appellate Division, Third Department, claiming a lack of jurisdiction, but the record has not been filed and the appeal has never been brought on for argument. The award has never been paid, nor has the respondent received from any source anything to compensate his loss.

The present action would have been barred by the Statute of Limitations on November 8, 1943, and relying on the principle of *O'Donnell v. Great Lakes Co.*, 318 U. S. 36, Marceau commenced this action in September, 1943, under the Jones Act, 41 Stat. 1007, 46 U. S. C. sec. 688.

The trial resulted in a verdict of the jury in favor of respondent in the sum of Four thousand, five hundred Dollars ($4,500.00); from the judgment entered thereon peti-

tioner appealed to the Court of Appeals for the Second Circuit, which unanimously affirmed. The opinion is not contained in the record and has not yet been reported.

Circuit Judge Augustus N. Hand set out the facts quite fully and found there was ample evidence to support the jury's finding that petitioner was negligent in causing or permitting the condition at the foot of the ladder and in failing to provide proper lights.

Judge Hand said: "The award for workmen's compensation is on appeal and it does not appear that any payments on account of it were made"; that since the District Court acquired jurisdiction of the action under the Jones Act, "there is no basis for invoking any doctrine of election of remedies and nothing has occurred in the way of an accord and satisfaction"; that "the plaintiff was acting under orders when he returned to the ship" and consequently "was not only acting in the course of his employment but suffered his injuries while on property in the possession and under the control of the defendant as lessee, over which the plaintiff had to pass in order to return to his work."

Judge Hand further said, concerning petitioner's claim that the Jones Act was applicable to injuries to seamen on land only when suffered subsequent to the decision of this Court in the *O'Donnell* case, *supra:*

> "The contention is based on the unsound notion that the decision, if it gave a new interpretation as to the extent of the remedies available to seamen under the Jones Act, was in effect like a statutory amendment of the Act. But the action is in tort, there was no abridgement by judicial decision of the contract rights of the parties even if an alteration of their rights by reason of such a decision would be forbidden. We

know of no precedent for holding that a failure to adhere to a former judicial limitation of claims to recover damages for negligence is an unlawful impairment of existing rights. The decision of the Supreme Court in *O'Donnell v. Great Lakes*, 318 U. S. 36, must be regarded as no more than a declaration of what was the law from the date the Jones Act took effect."

Petitioner now seeks a writ of certiorari.

ARGUMENT.

POINT I.

The compensation award, wholly unpaid, does not bar this action under the Jones Act; and there was no election of remedies.

An award of compensation has been made by the New York State Industrial Board, but respondent has received nothing under it; he has never received from any source anything to compensate him for his injuries; no money has ever been paid to him either under the award or otherwise.

The award of compensation was a nullity; it bound no one; it was a void determination and can be set aside or disregarded by either the vessel owner or the seaman.

Matter of Doey v. Howland Co., 224 N. Y. 30, 39.

If the award had been paid in full, then there would have been a common-law accord and satisfaction; and consequently acceptance of such payment would have destroyed respondent's right of action.

Brassel v. Electric Welding Co., 239 N. Y. 78, 80.

Even a partial payment of the award would not have amounted to a satisfaction of respondent's claim and would not have destroyed his right of action.

Larsey v. Hogan & Sons, 239 N. Y. 298, 302.

There can be no election of the remedies unless two or more remedies exist.

Bierce v. Hutchins, 205 U. S. 340, 347.
Schenck v. State Line, 238 N. Y. 308.

Here there is but one remedy. If the Industrial Board has jurisdiction, then and only then does the exclusive liability prescribed in Sec. 11 of the Compensation law apply. If, on the other hand, the District Court has jurisdiction, the Jones Act applies.

POINT II.

The effect of the decision in the O'Donnell case.

In *O'Donnell v. Great Lakes Co., supra*, this Court held that a seaman injured on shore while in the service of his vessel, was entitled to recover for his injuries in a suit brought against his employer under the Jones Act, and that Congress had constitutional authority to provide such a remedy for seamen.

The decisions of four different Circuit Courts of Appeals, cited at page 4 of petitioner's brief, must, therefore, be regarded as erroneous, and no constitutional rights can be based on the error of prior decisions.

Dunbar v. City of New York, 251 U. S. 516, 519.

In other words, a litigant who has trusted to the erroneous judgment of an inferior tribunal is not entitled to be helped out by the courts.

Evans v. Supreme Council, Royal Arcanum, 223 N. Y. 497, 503.

Cardozo, The Nature of The Judicial Process, pp. 147, 148.

If it should be assumed, contrary to the fact, that by its decision in the *O'Donnell* case this Court had overruled a former decision to the contrary effect, nevertheless the *O'Donnell* decision would be retrospective in its operation, and the effect would be not that the former decision was bad, but that it never was the law, and that the Jones Act covers, and always did cover, injuries to seamen sustained on land in the course of their employment.

People ex rel. Rice v. Graves, 242 App. Div. 128, 131, 133; affd. without opinion, 270 N. Y. 498; cert. denied, 298 U. S. 683.

Jackson v. Harris, 43 Fed. 2d 513, 516.

Ruppert v. Ruppert, 134 Fed. 2d 497, 500.

Chase v. American Cartage Co., 176 Wisc. 235.

However, we are not concerned with the effect of a decision which "overrules" an earlier decision of this Court. The question of law presented in the *O'Donnell* case had not previously been presented to this Court, which, in effect, disapproved as erroneous the decisions of the Circuit Courts of Appeals cited by petitioner. The construction given to the Jones Act in those decisions was, as the *O'Donnell* case held, incorrect as the Act existed when the decisions were rendered. In rejecting the principle underlying those decisions this Court was not disregarding the principle of *stare decisis*, it was attempting to settle a question

of law which until then had not been determined by the final tribunal of the United States.

Sears, Roebuck & Co. v. 9 Ave.—31 St. Corp., 274 N. Y. 388, 401.

POINT III.

Respondent was injured in the course of his Employment.

Respondent, at the time of his injury, was returning to his vessel to prepare the midnight lunch at the direction of the steward; for such purpose he was crossing the dock of petitioner, his employer, and had arrived within a few feet of the foot of the vessel's ladder (pp. 50-55). He, therefore, "suffered personal injury in the course of his employment" within the meaning of the Jones Act.

It is a general rule that, if an employee is injured on the premises of his employer in going with reasonable dispatch and method to or from actual performance of the specific duties of the employment by a way provided by the employer or reasonably used by the employee, such injury is suffered in the course of his employment; that the going to and from the actual work and the risk involved in it are reasonably incident to the employment.

Erie R. R. Co. v. Winfield, 244 U. S. 170, 173.
Cudahy Co. v. Parramore, 263 U. S. 418, 426.
Matter of Lynch v. City of New York, 242 N. Y. 115, 118.

In a compensation case the deceased, employed as a longshoreman, was ordered to report to work at seven p. m. to scoop grain on a steamship tied up to the dock of a grain

elevator in Buffalo harbor. About fifteen minutes after seven a co-employee missed the deceased, and, after a search, his scoop was found on the dock opposite the stern of the boat and later on his body was found floating under the dock. The Industrial Board found that the deceased, while working for his employer, fell into the water and was drowned; and that the injury resulting in his death was an accidental injury arising out of and in the course of his employment. The award was affirmed.

Matter of Commissioner of Taxation, etc. v. Grain Handling Corp., 272 N. Y. 548.

The Federal Employers' Liability Act (35 Stat. 65; 53 Stat. 1404; 45 U. S. C. secs. 51-60), which has been made applicable to seamen by the Jones Act, provides in section 1 that "every common carrier by railroad while engaging" in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * boats, *wharves*, or other equipment." (Italics supplied.)

This means that the vessel owner must provide for his seamen a safe wharf for passing to and from the vessel.

This Court, in a recent case, has summed up the situation here presented as follows:

> "The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the con-

fines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landsman, therefore, 'the superfluous is the necessary * * * to make life livable' and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion."

Aguilar v. Standard Oil Co., 318 U. S. 724, 733.

POINT IV.

The petition should be denied.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THOMAS C. BURKE,
EDWARD J. DESMOND,
JOHN E. DRURY, JR.,
Counsel for Respondent.